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## facsimile transmittal

To: Thomas L. Morrison  
Deputy Executive Director Fax: (916) 263-0959

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From: Rocky Delgadillo Date: 10/23/2006

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Re: Opposition to Proposed Changes to the  
California Plumbing Code Regarding  
CPVC, PVC, ABS, PEX or PEX-AL-PEX  
Plastic Pipe Pages: 7, including cover page

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**OFFICE OF THE CITY ATTORNEY**

ROCKARD J. DELGADILLO  
CITY ATTORNEY

October 23, 2006

Thomas L. Morrison  
Deputy Executive Director  
California Building Standards Commission  
2525 Natomas Park Drive, Suite 130  
Sacramento, CA 95833

RE: Opposition to Proposed Changes to the California Plumbing Code  
Regarding CPVC, PVC, ABS, PEX or PEX-AL-PEX Plastic Pipe

Dear Mr. Morrison:

The City of Los Angeles respectfully requests the California Building Standards Commission ("Commission"), the Department of Housing and Community Development ("HCD"), and the Division of the State Architect ("DSA") (collectively "the Agencies") to set aside for further study the proposed adoption of building standards expanding the approved uses of CPVC potable water pipe and PVC and ABS drain, waste and vent ("DWV") pipe and approving the use of PEX and PEX-AL-PEX potable water pipe. The specific proposals that would approve or expand approval of these materials are contained in the proposed changes to California Plumbing Code sections 604.1, 604.1.1, 604.1.2, Table 6-4, 604.11, 604.11.1, 604.11.2, 604.13, 604.13.1, 604.13.2, 701.1.2.2, 903.1.2.2, 1101.3.1, 1101.3.3, and 1102.1.2.

We oppose adoption of these plastic pipe materials because they have been proposed for approval without adequate examination of the potential public health and safety impacts associated with the use of these products. Approval of these products without first resolving the numerous concerns associated with their use is bad public policy and is inconsistent with the requirements of the California Environmental Quality Act ("CEQA").

Prior to approving or expanding the approval of CPVC, PVC, ABS, PEX or PEX-AL-PEX plastic pipe, CEQA requires that public agencies and the public be fully informed about the potential impacts of these products on public health and the environment. CEQA's purpose is to inform the public and its responsible officials of the environmental consequences of their decisions *before* they are made. (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.)

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The applicability of CEQA to the approval of proposed building standards was affirmed in the case *Plastic Pipe and Fitting Association v. California Building Standards Commission*, (2004) 124 Cal.App. 4th 1390. The City of Los Angeles participated as amicus curiae in that case.

The City of Los Angeles has a direct interest in ensuring environmental review of potentially hazardous building materials. Once approved at the state level, local governments are limited in their authority to restrict the use of building materials at the local level. Our building department would thus be required to allow the use of CPVC, PVC, ABS, PEX and PEX-AL-PEX even if the Commission adopted these regulations without adequate environmental review.

California Building Standards Law states that proposed building standards may not be approved where their adoption would not be in the "public interest" or would be "unreasonable, arbitrary, unfair or capricious." (Health & Safety Code § 18930.) The approval and expanded approval of these plastic pipe materials without first fully complying with CEQA and adequately evaluating and mitigating the potential impacts on workers, consumers and the general public would be both contrary to the "public interest" and "unreasonable, arbitrary, unfair or capricious." We urge the Commission to "disapprove" or set aside for "further study" these proposed regulations.

#### **I. PROPOSED EXPANDED APPROVAL OF CPVC**

HCD proposes greatly expanding the approved use of CPVC potable water pipe. Current use of CPVC potable water pipe is limited to the few areas of the state where metal pipe has been shown to prematurely fail due to aggressive water or soil conditions. In addition, the approval of CPVC in these limited situations is at the sole discretion of the local jurisdiction.

HCD's proposal would require all cities and local jurisdictions to approve the use of CPVC in any home or other residential building in the state. The City would thus have no authority to review CPVC on a case-by-case basis, or to deny approval based on environmental or public health risks.

HCD prepared a draft Environmental Impact Report ("draft EIR") on the proposed expanded approval of CPVC potable water pipe. While a step in the right direction, the CPVC draft EIR inadequately evaluates or fails altogether to evaluate numerous potential environmental, health and safety impacts associated with the expanded approval of CPVC. The draft EIR also fails to adequately analyze project alternatives as required under CEQA.

Rather than actually evaluating the evidence of potential worker health impacts, toxic leaching impacts and fire hazard impacts associated with the

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expanded use of CPVC, HCD argues that it is not legally required to evaluate these impacts. HCD asserts that it may instead rely upon the evaluation of similar impacts contained in the Mitigated Negative Declaration prepared in 2000 on the restricted, discretionary approval of CPVC. This attempt to tier off of a prior mitigated negative declaration violates CEQA and needlessly puts the public at risk.

CEQA only allows a project to rely upon the evaluation of a prior project when the later project is a narrower project that falls within the scope of the earlier, broader project. (CEQA Guidelines § 15152.) In the case at hand, however, the restricted, discretionary approval of CPVC evaluated in the 2000 Mitigated Negative Declaration was significantly narrower in scope than the proposed expanded, mandatory approval evaluated in the draft EIR.

Moreover, CEQA only permits a lead agency to tier off a prior CEQA document "when the sequence of analysis is from an EIR . . . to an EIR or negative declaration." (CEQA Guidelines § 15152.) In the case at hand, the draft EIR improperly attempts to tier from a prior mitigated negative declaration.

The draft EIR's failure to evaluate these potential impacts is significant because substantial evidence exists that the mitigation measures relied upon in the 2000 Mitigated Negative Declaration are not effective. We have reviewed, for example, the September 8, 2006 comments of Dr. Jim Bellows who concludes that workers who install CPVC pipe are likely to be overexposed to toxic primer and cement solvents above the legal limits on a regular basis despite the ventilation and glove use requirements imposed as conditions of the 2000 Mitigated Negative Declaration. He also concludes that the requirement that workers use 4-mil nitrile gloves may actually *increase* worker exposure to contaminants. In other words the draft EIR may be relying upon mitigation measures that actually increase the danger to workers. The Commission should set aside the proposed expanded approval of CPVC until the claims of Dr. Bellows are evaluated in a revised draft EIR.

The EIR also ignores the difficulties cities have faced in recycling and disposing CPVC. A 2005 "Plastic Pipe Alternatives Assessment" by the San Francisco Department of the Environment examined the solid waste disposal problems posed by plastic piping and found that CPVC is considered a "contaminant" in the waste stream and has a "negative recycling profile." The same report found that CPVC pipe may make residential fires, waste incinerators and landfill fires significantly more dangerous through its release of dioxins when burned.

We urge the California Building Standards Commission to set aside for further study the proposed regulations expanding the approval of CPVC pipe on the grounds that the CPVC draft EIR fails to adequately evaluate and mitigate potential impacts on workers, consumers, and the general public.

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## **II. PROPOSED EXPANDED APPROVAL OF PVC & ABS DRAIN, WASTE AND VENT PIPE**

Currently HCD restricts the use of ABS and PVC DWV pipe to buildings no more than two stories in height. HCD now proposes to remove this long-standing restriction. To date, however, no environmental review has been prepared to evaluate the potential impacts of this proposal. The *PPFA v. CBSC* case, which we participated in, makes clear that CEQA applies to the expanded approval of building materials such as PVC and ABS DWV pipe.

The current PVC and ABS restrictions were put in place, in part, due to concerns that these flammable pipes may increase the risk of fire spread to other rooms in a dwelling. Both ABS and PVC also release thick, choking smoke when burned. In addition, PVC releases cancer-causing dioxins when burned.

ABS also has a well-documented history of degrading and rupturing prematurely. During the 1980's, numerous brands of ABS failed prematurely, causing extensive damage to homes. Both PVC and ABS are also susceptible to failure if certain substances are disposed down the drains. DWV failures are significant because they may result in the release of sewer gas and human waste in walls and living spaces.

ABS and PVC are joined with cements that contain chemicals harmful to workers and the environment. As with CPVC, the increased use of these cements may result in cumulatively significant impacts on air quality and worker health within our jurisdiction.

Further study is required under CEQA to fully evaluate the potential impacts of these materials and to identify appropriate mitigations and alternatives. The proposed regulations expanding the approved use of PVC and ABS DWV pipe should be disapproved until such impacts are adequately evaluated in an EIR.

## **III. PROPOSED APPROVAL OF PEX AND PEX-AL-PEX**

HCD has released a Negative Declaration on the proposed regulations approving PEX and PEX-AL-PEX potable water pipe. Reliance upon this Negative Declaration, however, is improper because substantial evidence of potential impacts exists that require the preparation of an EIR.

A negative declaration may be prepared instead of an EIR when, after preparing an initial study, a lead agency determines that a project "would not have a significant effect on the environment." (Pub. Res. Code § 21080(c).)

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However, such a determination may be made only if there is "no substantial evidence in light of the whole record before the lead agency" that such an impact may occur. (Pub. Res. Code § 21080(c)(1).) If a lead agency is presented with a fair argument that a project may have a significant effect on the environment, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect. (CEQA Guidelines § 15064(f)(1).)

Substantial evidence of potential impacts from the use of PEX and PEX-AL-PEX has been submitted to HCD during several past proceedings to which we have been participants, including the proceedings reviewed in the *Plastic Pipe and Fitting Association v. California Building Standards Commission* case.

In its opinion in that case, the court found that a report by chemist Thomas Reid raised grave concerns about the potential dangers posed by the use of PEX, "including the potential for (1) chemical leaching of substances from the pipes; (2) permeation of the pipes by toxic substances contained in the surrounding soil and groundwater; (3) mechanical failure of the pipes; and (4) rupturing of the pipes when exposed to high heat, which may create openings that could contribute to the spread of fire." (*PPFA v. CBSC* (2004) 124 Cal.App. 4th 1390, 1407.) The court then concluded that "the Reid letter is substantial evidence . . . that PEX potentially may present an unreasonable risk of harm." (*Id.*) In light of this holding, an EIR must be prepared.

Furthermore, HCD admits in the Negative Declaration that PEX and PEX-AL-PEX are susceptible to permeation, leaching of MTBE at "high levels", biofilm formation, and mechanical failure. The Negative Declaration states that:

- Tests have shown that PEX and PEX-AL-PEX pipe may leach high levels of MTBE and that PEX should not be used in areas of the state with MTBE water contamination. (Negative Declaration at pp. 7-8.)
- PEX pipe that meets ASTM standards for exposure to sunlight "may fail in the field before 50 years, especially if it has suffered stabilizer loss due to other factors." (Negative Declaration at p. 8.)
- PEX is subject to permeation by toxic chemicals when exposed to contaminated soils or when sprayed with termiticides or pesticides. (Negative Declaration at p. 10.)
- PEX may increase the risk of exposure to *Legionella* due to biofilm formation for at least the first two years of its use. (Negative Declaration at p. 14.)

Despite these admissions, the Negative Declaration fails to impose any mitigation measures to address these issues. Moreover, the Negative

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Declaration improperly dismisses these impacts by weighing competing evidence and concluding that the risk from these impacts is "not of such magnitude that the state ought to limit the consumer's choice in plumbing materials." (Negative Declaration at p. 11.)

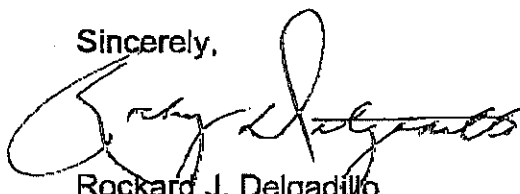
Under CEQA, the admission of potential impacts requires the preparation of an EIR even if the Negative Declaration concludes that other factors may argue against the likelihood of such impacts occurring. An EIR must be prepared to properly evaluate the evidence of these impacts and to determine if feasible alternatives exist or if mitigation measures can be imposed to reduce these risks. Approval of PEX and PEX-AL-PEX without proper evaluation of these impacts would not be in the public interest.

#### IV. CONCLUSION

We urge you to set aside for further study the proposed changes to the California Plumbing Code to approve or expand the approved uses of CPVC, PVC, ABS, PEX or PEX-AL-PEX plastic pipe. Further compliance with CEQA is necessary to ensure the protection of homeowners, workers and residents in our jurisdiction.

Thank you for taking our comments into consideration.

Sincerely,



Rockard J. Delgadillo  
City Attorney